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ABSTRACT

Divided into four sections, this paper discusses the historical development of land-use control law and doctrine. Entitled "Genesis of the Zoning Mechanism", Part 1 discusses zoning in terms of: a by-product of urbanization: common law land-use controls (public and private nuisance laws); private property as restraint on land-use legislation (State and Federal constitutional issues); approaches to the cities' problems (setbacks, height, and use limitations; eminent domain; and constitutional limitations); early problems of zoning legislation (need for enabling legislation and State Court approval); widespread adoption of zoning; and judicial obstacles still remaining. Part 2 is titled "A Basic Outline of Zoning as a System" and deals with the: zoning ordinance; operation of the zoning system; and zoning system as segregated from the planning function. Titled "The Parameters of Zoning", Part 3 discusses zoning and the general welfare and the fifth amendment. "The Development of Alternative Methods of Land-Use Control" is the title of the final section which deals with: early agricultural zoning; real estate tax preferment of open land; easements; state level controls; new thrusts; and "projections dangerous." (JC)

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A Basic Introduction to Land Use Control Law and Doctrine

by

E. F. Roberts

Northeast Regional Center for Rural Development
Cornell University, Ithaca, New York

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FOREWORD

Professor Roberts' paper was prepared for the Northeast Regional Center for Rural Development. It was used as the basis of his presentation on "The Use of Direct and Indirect Police Power for Land-Use Control" at the Conference on Rural Land-Use Policy in the Northeast held October 2-4, 1974 under the sponsorship of the Northeast Center and cooperating groups affiliated with the land-grant colleges and universities in the 12 Northeastern states. The complete paper was published in the Proceedings of that Conference (pages 13-53 of the Center's Publication 5).

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The paper by Professor Roberts is a valuable resource for public policy education in the area of rural land use, an area which is at the center of issues of great importance to individuals and to communities in the Northeastern states. It is reprinted as a part of the program conducted by the Northeast Regional Center for Rural Development under Section 503 (b)(2), Title V of the Rural Development Act of 1972 and as a part of its program supported by P. L. 89-106 special grant funds provided through the Cooperative State Research Service, U.S. Department of Agriculture.

Olaf F. Larson

Director, Northeast Regional Center
for Rural Development

A BASIC INTRODUCTION TO LAND USE CONTROL LAW AND DOCTRINE

E. F. Roberts

I. GENESIS OF THE ZONING MECHANISM

> "No one in America feels any great concern for protecting agricultural land from urban development."
>
> DEFALONS, LAND-USE CONTROLS IN THE UNTIED STATES 9 (1962)

A. ZONING - A BY-PRODUCT OF URBANIZATION

Early American settlements were planned communities.[1] In the Massachusetts Bay Colony, for example, the colonial farmers lived within a built-up village and daily went out to the fields that surrounded this cluster of housing. Most villages centered on a common, and the house lots were arranged around it on the basis of a squared grid. It was not unusual to find provisions that required housing to be set back a prescribed distance from the street line. More interesting still, these colonial schemes envisaged a limited population, the assumption being that, when the village as planned filled up, the time had arrived to found an entirely new settlement elsewhere for the overspill.

Even though New England began as an agricultural society, economics shortly triumphed over tradition, and these neatly planned new towns disappeared. When (in 1776) Adam Smith published his Wealth of Nations, commercial society had begun to replace agricultural society in the Anglo-Saxon countries. Trade and commerce appeared to offer more rapid routes to wealth than farming, and people active in trade and commerce began to co-opt the town proper, while the farmers began to locate their homesteads on the sites of their particular acreages. The price structure of land calculated in terms of its strategic urban location was beginning to influence the life-styles of the various callings. In the process, the villages grew into towns, and haphazard construction all but obscured the original design of most American centers of habitation.

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No sooner, moreover, had Adam Smith purported to define the rules that governed the market place than commerce based upon cottage industry began to be replaced by the factory system. Arkwright's spinning frame - the starting point in the history of mass production - was invented in 1770. The iron foundries began to appear around 1780. Thereafter towns began to spring up not on the basis of pure chance but in response to a calculus involving the coalescence of raw materials, fuel, transportation, and labor supply. Pittsburgh, for example, is the net result of commercial ingenuity applied to a place where there co-existed a river system, a coal supply, available ore, and immigrant labor.

Pittsburgh can be envisaged, then, as a product of human genius and resource topography. Yet it was operating out of New York City that J. P. Morgan was able to assemble the capital necessary to create the mammoth United States Steel Corporation in 1901. Improved communications technology - the telegraph, the telephone - enabled a new breed of entrepreneurs to locate their corporate headquarters in the city where there had developed a unique market in the most essential commodity of all: money. Dependent upon capital-intensive technology, industrial capitalism gave rise to its own bureaucracy located in Manhattan near the banks and stock markets which provided this essential resource. Office buildings housing this white-collar work force became common fixtures. Given the widespread perceived need to be by the financial centers, and the resultant escalation of the price of appropriate land, the urge to build up into the sky developed. As chance would have it, another series of technological advances opened the door to the trend to develop vertically.

High buildings made no sense at all until the elevator was perfected into a reasonably efficient and safe system of vertical ascent, and until high-pressure heating and plumbing systems were developed to service their upper floors. No skyscraper was plausible if it required recessing walls of solid granite to support itself, both because of the cost of construction and the vast lots needed if the ground floor was going to have any floor space at all. Once steel could be fabricated into a skeleton and cement could be poured over this matrix to serve as a mere skin enveloping the structure, then indeed the sky became the limit. Thus, a number of practical engineering breakthroughs coming to fruition across a broad spectrum around the year 1900 opened the way for an increase in skyscrapers in center cities. Indeed, by 1913 Manhattan could boast of some fifty buildings that rose more than twenty stories and nine more that exceeded thirty stories.

The trend to build upward proved to be a mixed blessing. It did utilize most efficiently scarce and expensive horizontal space, but it tended to convert the streets below into dark canyons. Before the science of artificial lighting was perfected, moreover, daylight and windows were vital. Hence, whenever A constructed a skyscraper on his parcel, he placed his neighbor B in a quandary. On the one hand, B's old building might be overcast by a shadow for most of the day and its value thereby decreased. On the other hand, if B built a skyscraper on his parcel close to A, one wall might have nearly useless windows and, perforce, the building would not draw tenants as efficiently as otherwise would be the case. In any event, it dawned upon some property owners that the first entrepreneur to build a skyscraper tended to inflict harm upon his immediate neighbors, albeit nuisance-law-wise this was, as we shall see, damnum absque injuria.

At the same time, subways were beginning to criss-cross Manhattan. Would-be builders of skyscrapers tended to locate their new towers near subway terminals so that the labor force would be attracted to the site by the convenience of travel thereto and therefrom. Even worse, the garment makers were beginning to locate their lofts downtown to cut their delivery costs once the subways made it possible for them to bring their labor from the tenement slums to the factories. All of this "progress" had little appeal to Fifth Avenue merchants who purveyed luxuries to the rich. A gloomy canyon lined by skyscrapers did not match their image of what an exclusive shopping area should be. Streets overrun morning, noon, and afternoon by commuting hordes of relatively grubby workers did not particularly amuse them either, although a subway terminal nearby did catch their interest[2]. Determined as they were to "preserve property values", these merchants banded together under the aegis of the Fifth Avenue Association to lobby at City Hall for relief[3].

B. COMMON LAW LAND USE CONTROLS

Surveying the jurisprudential scene circa 1900-1930 must have been a somewhat disheartening experience for anyone interested in planning. The only remedy provided by the law in the instance of conflicting uses of land was by way of nuisance law, and this particular body of learning was, as it still is, in a state of deplorable disarray. It was clear, however, that ever since the Wars of the Roses there had existed the potential for someone to decide to raise pigs in a neighborhood wherein everyone else maintained a polite residence. While this did not involve a trespass, since no physical invasion of neighboring property occurred, the courts early had fashioned a writ whereby outraged neighbors could seek a judicial order requiring their innovative neighbor to cease causing odors to permeate the neighborhood[4]. Even so, so complicated were the pleadings in this particular action that, when the courts permitted a money action for damages as well[5], everyone resorted to lawsuits for damages in lieu of abatement[6]. Ultimately, when the antipathy to equity courts subsided, inspired as it had been by association with royalist Star Chamber, American equity jurisprudence evolved and began to take cognizance of nuisance suits and to issue injunctions[7].

1. The Limits of Nuisance Law

Nuisance law, however, crystallized into a certain pattern that tended to countenance noise-making and smoke-making activity in urban centers which in more genteel areas would be abated at the drop of a hat[8]. At the same time, nuisance law came to demand that the defendant's behavior on his land cause smoke, noise or odor to invade plaintiff's parcel, if there was to be a remedy[9]. Crowds using the public streets were beyond the ken of nuisance jurisprudence, as were the cases in which someone built a skyscraper that cast his neighbor into perpetual darkness[10].

a. Private Nuisance Law

These disputes between adjacent landowners, in which a plaintiff sought to have enjoined behavior which unreasonably interfered with his enjoyment of his estate, were collected under the caption "private nuisance law." While these were nothing more than tort cases, they did tend to serve as a primitive zoning tool since, by and large, industrial activity was enjoined as unreasonable behavior in suburban residential areas, while it

was licensed as eminently reasonable in urban centers[11]. Only recently has it been recognized that this de facto licensing of nuisance-style activity in urban areas actually contributed to the despoliation of the environment in those areas so that, perforce, this body of law has of late been subjected to a searching re-examination of first principles[12].

b. Public Nuisance Law

More directly relevant to our story here were the related cases collected under the caption of "public nuisance." These nuisances were crimes[13], the list of offenses having accumulated in England case by case[14], although the American style dictated an effort to reduce the list to a statutory prohibition[15]. By and large, these crimes consisted of offenses such as maintaining the likes of gun powder factories or rendering plants in built-up areas. Perforce, this body of law was also a primitive form of land-use planning since it tended to exile to the hinterlands uses that threatened the comfort and safety of the public in general[16]. As will shortly become apparent, public nuisance law was to have a direct influence upon the emergence of zoning law.

C. THE IDEA OF PRIVATE PROPERTY AS A RESTRAINT UPON LAND-USE LEGISLATION

It is crucial to realize that while actual nuisances were subject to abatement, American jurisprudence otherwise treated the owner of a parcel of land as pretty much absolute sovereign over his dimunitive domain. This is perfectly illustrated by the way the Colorado court reacted to an early land-use control scheme devised in Denver just before the outbreak of the 1914-1918 War[17]. In the residential areas of Denver it ceased to be possible to qualify for a permit to build either an apartment house or a store unless the applicant filed with the building inspector the signatures of the majority of the property owners in the area immediately concerned, together with a certificate by a reputable abstract company evidencing that the signatories actually were the owners. Even with the requisite signatures in hand, the would-be developer had to agree in writing to conform to the average setback in vogue in the area. A landowner resorted to mandamus (court order) against the building inspector to obtain a permit without complying with this new scheme. He was successful because, according to the judges, this scheme deprived the applicant "of the fundamental right to erect a store building upon his lots covering such portions thereof as he chooses."[18]

1. State and Federal Constitutional Issues

This reaction is to be explained because the exercise of legislative authority to regulate land use entails the exercise of the police power. It is axiomatic, of course, that the state as sovereign has the inherent authority to make laws designed to protect the public safety, public health, morality, peace and quiet, and law and order. Indeed, it has recently been observed that, relative to the police power, "An attempt to define its reach or outer limits is fruitless."[19] So far-reaching is the police power, of course, that obviously a society premised on less than parliamentary absolutism must have recourse to somewhat intractable constitutional norms designed to set some guidelines limiting the scope of this inherent authority. As a result, in this country, certain constitutional restraints function at both the state and federal level.

State constitutions, first of all, tend to differ radically from the federal charter. Simply put, whereas the Constitution is largely a list of "do's," state constitutions tend to be an inventory of"don'ts."[20] The whole theory of the national charter, after all, was symbolized by the Tenth Amendment dogma that all powers not expressly granted to the central government were reserved to the several states. As a result, the federal charter, given the prevailing notion of severely limited powers, could consist of a relatively simple inventory of matters with which the central government could concern itself. Conversely, this left the state legislatures authorized to exercise the now-defined totality of sovereign power not exclusively delegated to the central government. Given the Revolutionary War ethic that government should be severely circumscribed, this necessitated drafting state constitutions that set limits around the inherent authority of the state governments.

After the Civil War, of course, the legislative authority of the states was further circumscribed by the imposition of the Fourteenth Amendment's command that no "State [shall] deprive any persons of life, liberty or property, without due process of law." Aggrieved citizens now had recourse, if the state constitution did not protect them, to the federal courts. Thus it was that the police power, the general authority of any sovereign to legislate, came to be defined for due process purposes in terms of health, safety, morals, and general welfare[21]. These were ends toward the protection of which the exercise of legislative authority was justified. Even so, the means adopted to achieve these ends had to be reasonable ones. For example, a state legislature might require everyone to be vaccinated to protect the public health. It could not, however, require that the vaccine be applied with a hot branding iron when a simple scratching technique would suffice[22].

Observe now that the Colorado court condemned the Denver scheme on both state and federal constitutional grounds. State-wise the scheme was seen to contravene a local constitutional provision guaranteeing Colorado citizens the "natural essential and inalienable 'right' of acquiring, possessing, and protecting property."[23] At the same time it contravened due process because a "store building is in no sense a menace to the health, comfort, safety or general welfare of the public; and this is true whether it stands upon the rear portion of the lots upon which it is erected, or is constructed to the line of the street."[24] The measure thus exceeded the parameters of the police power; it "would clearly deprive him of his property without compensation"[25] and, perforce, it was confiscatory.

D. APPROACHES TO THE CITIES' PROBLEMS

1. The Perceived Need for Setbacks, Height, and Use Limitations

To return to our story about the efforts of the Fifth Avenue Association to rationalize land-use patterns in New York City, the Board of Estimate and Apportionment was persuaded in 1913 to create an Advisory Commission on the height of buildings. This it did at the behest of George McAneny, lawyer, journalist, leading light of the City Club, and borough president of Manhattan. Chairman of the Commission was Edward M. Basset, lawyer, self-made man, and pioneer planner. Both men were friends, loved the city, and were what we would call "reformers."[26] The report of this commission indicated that merely setting limits on the height of buildings

was not the answer to Manhattan's problem; rather, a system of setting back upper levels pyramid-style was more appropriate. More significant still, the commission concluded that controls had to be imposed upon the uses to which land was put in different parts of the whole city.

In this second conclusion lay the rub. The height of buildings might be regulated, because such regulations, even when motivated by aesthetic considerations, could be justified in terms of safety because building technology threatened to outpace the capacity of fire-fighting equipment to deal with conflagrations in the new skyscrapers[27]. Prohibiting a man from constructing a store in a residential district, however, raised the spectre of unconstitutionality, witness the contemporary Colorado experience[28]. Counterpoint to Denver, however, was provided by Los Angeles, where certain buildings and uses were excluded from residential districts[29]. The difficulty was that the excluded uses in Los Angeles included such a litany of stone-crushers, rolling-mills, carpet-beating establishments, fireworks factories, and soap factories that this legislation appeared to be little more than a traditional public nuisance prohibition.

2. Eminent Domain Rejected as a Strategy

For a time it would appear that the proponents of zoning thought of conceding the merit of the Colorado response and, in lieu of proceeding in terms of the police power, considered invoking the power of eminent domain[30]. Control of land use could be achieved, after all, by condemning the owner's right to put his property to a different use than it had at the time the enactment went into effect. The costs would have been enormous, and the administrative headache of such a scheme, entailing as it would individual awards to each owner, put people off. Interestingly enough, in 1913 it would have been questionable whether eminent domain would have been available as an alternative device, since the due process line of authority restricted the states to taking property only if it was to be put to a public use[31]. It wasn't until 1916 that the Supreme Court through Mr. Justice Holmes rejected this doctrine in favor of a broader one authorizing takings to achieve a public advantage[32]. By then, however, the protagonists of zoning had rejected the condemnation approach on practical grounds[33]. Déjà vu, the condemnation approach has recently become a lively topic of concern to land-use planners[34].

3. Surmounting Constitutional Limitations

Having concluded that the imposition of land-use controls by way of the exercise of eminent domain was impractical, the proponents of controls still had to face the objection that the imposition of such controls through the aegis of the police power would be declared unconstitutional as tantamount to a taking of property without the payment of just compensation. Apart from nuisance law cases, after all, ownership of real property included the unfettered right to develop it, and zoning would clearly impinge upon the free exercise of these development rights. Coincidentally, however, in 1915 the Supreme Court decided a case which evidenced a judicial inclination to allow society to impose remarkable costs upon a landowner in the name of regulations designed to improve the general welfare.

a. A Helpful Precedent

Hadachek v. Los Angeles[35] was really a public-nuisance-style case.

The gist of the controversy was that Los Angeles had annexed territory in order to expedite residential expansion. Included in this new territory was land upon which petitioner was manufacturing bricks on the site of a rich clay deposit. Los Angeles then outlawed the manufacture of bricks within the city limits, a relatively conventional measure designed to protect its inhabitants from noxious trades that were better suited to remote areas. In this case, however, the petitioner had begun his trade in the hinterlands in the first place and the enactment of the measure at this time meant shutting down petitioner in order to expedite building on the area. True, petitioner could cart his clay farther out into the hinterlands, manufacture bricks there and cart the finished product back into the city again, but the transportation costs would render his business uncompetitive. Petitioner was threatened with seeing an $800,000 manufacturing parcel reduced in value overnight to $60,000 worth of land suitable only for residential development. It was little wonder that the case came before the Supreme Court by way of a habeas corpus proceeding, because petitioner went to jail rather than comply with the new scheme. Even so, the Court sustained the measure, remarking that "There must be progress, and if in its march private interests are in the way, they must yield to the good of the community."[36]

b. Zoning Legislation Enacted

Bolstered by this opinion, the reformers went ahead with their scheme to divide the City of New York into districts and to regulate therein the location of trade and industry. The Board of Estimate appointed a second commission to recommend the boundaries of districts and appropriate regulations to be enforced therein. Ultimately this second commission, under Bassett's chairmanship again, concocted the zoning resolution which was finally enacted by the Board of Estimate in 1916. Thus it was that Fifth Avenue's parochial problem led to the enactment of the first comprehensive zoning ordinance in the United States. More important, American land-use controls had been cast in the regulatory mold, a decision that was to influence the development of those controls even up to today[37].

E. EARLY PROBLEMS OF ZONING LEGISLATION

1. The Need for Enabling Legislation

It is crucial to note that as part of the process of zoning New York City it was necessary to obtain enabling legislation from the state legislature in Albany[38]. Cities, towns, and villages are "municipal corporations" and possess only the authority granted them in charters bestowed by the state[39]. Apart from the federal question whether zoning accords the citizen due process of law, there always coexist two fundamental local issues of law: has the local unit of government[40] been authorized by the state to zone in such and such a fashion, and does the state constitution itself sustain the notion that the state legislature possesses the requisite authority to bestow such powers upon constituent units of government?[41] These are elementary considerations, but being so elementary, they are easily overlooked, with disastrous results.

2. The Need for State Court Approval of the Idea

New York's highest court had in short order to decide whether the zoning notion was constitutional. The judges had no problem at all.

> "In a great metropolis like New York, in which the public health, welfare, convenience and common good are to be considered, I am of the opinion that the resolution.... was a proper exercise of the police power. The exercise of such power, within constitutional limitations, depends largely upon the discretion and good judgment of the municipal authorities, with which the courts are reluctant to interfere. The conduct of an individual and the use of his property may be regulated."[42]

Thus, granted that the enactment in question "simply regulates the use of property", "does not discriminate between owners", and "is applicable to all alike", the zoning resolution was an appropriate exercise of the police power[43].

F. WIDESPREAD ADOPTION OF ZONING

Once the zoning resolution was promulgated in New York City, the zoning idea spread like wildfire across the country[44]. In 1920, for the first time more Americans lived in urban than rural areas. By 1920, moreover, thirty-five cities had enacted zoning ordinances. By 1926 that number had mushroomed to 591, and by 1932 the figure reached 1236. As early as 1921, moreover, Secretary of Commerce Herbert Hoover caused to be created an advisory committee which issued a Standard State Zoning Enabling Act, the first edition of which in 1924 sold 50,000 copies[45]. Zoning appeared to have "arrived", and cases sustaining the constitutional propriety of the mechanism began to accumulate.

G. JUDICIAL OBSTACLES STILL REMAINING

Appearances were deceptive. There did exist an undertow of decisions by state tribunals which, reminiscent of the Colorado court, were not persuaded that the exclusion of a grocery store from a residential neighborhood had anything to do with bettering the health, safety, morals, and general welfare of the community[46]. More crucial still, the Supreme Court of the United States had not decided whether the zoning mechanism accorded the citizen the due process of law guaranteed him by the Fourteenth Amendment. Particularly crucial now was going to be the attitude of the nation's highest court to any device that inhibited the rights of a real property owner.

A careful reading of the New York court's language quoted above should strike the reader as a typical exegesis in judicial restraint. But this is the point. The contemporary Supreme Court was the tribunal that had emasculated much of the state efforts at social legislation by reading its own substantive notions of laissez faire into the due process clause of the Fourteenth Amendment[47]. This was the same court which in the early days of the New Deal would yet wreak havoc with the federal effort to regulate the economy by giving an unnecessarily broad sweep to the Tenth Amendment[48]. Ultimately, of course, this was to lead to a tremendous row, after which the court did beat a strategic retreat and, at least for a time, the doctrine of judicial restraint became the established canon[49]. As it was, however, zoning was to be tested before the unreconstructed Court.

1. Euclid v. Ambler Realty Co.

The battle lines were drawn in the miniscule village of Euclid, Ohio, then a satellite community to the east of Cleveland. Euclid Avenue ran across the village from west to east, and at that time it was a tree-lined thoroughfare largely given over to residential use. Even so, the expansion of Cleveland and the increasing traffic along the avenue was already seeing the western end of the street evolve into a strip development of garages and convenience stores. Unless the community did something, the handwriting was on the wall, and ultimately Euclid Avenue would lose its traditional character. Thus it was that the village opted for a zoning ordinance which, by and large, restricted the land on either side of Euclid Avenue to residential use while, at the same time, it allowed industrial development along the railway tracks that paralleled the avenue farther to the north. The zoning scheme was designed, then, to channel development, allowing for industry while preserving the residential character of traditional segments of the village. The difficulty was that the plaintiff owned a parcel of land on the north side of Euclid Avenue, on the Cleveland side of the village. So deep was his parcel, as a matter of fact, that it was zoned for duplex residences along the avenue, for apartments farther back and then, finally, for industry along the railways. Had the land gone unregulated and the ribbon development of Euclid Avenue gone on as expected, the southern portion of the parcel would have continued to be worth $10,000 an acre. What with zoning restricting future development to residential uses, the same area was worth only $2,500 an acre.

The Ohio courts had sustained the validity of zoning in principle, but the owner of this parcel entered the federal court system to press his claim that this ordinance was unconstitutional because it amounted to a taking of his property without due process of law. Plaintiff was successful in the lower court so that the burden devolved upon the village authorities to carry the argument into the Supreme Court. There the case was argued twice. Ultimately, a majority of the justices sustained the validity of the ordinance and, perforce, the constitutional propriety of the zoning mechanism. Indeed, the result in this benchmark case may have been a nearer-run thing than was recognized at the time. This was so because it has since been reported that Mr. Justice Sutherland was writing the majority opinion which would have struck down the scheme when informal chats with the dissenters "shook his convictions and led him to request a reargument after which he changed his mind and the ordinance was upheld."[50]

In order properly to appreciate the development of zoning law one must pay particular attention to the dialectic employed by the Court in Village of Euclid v. Ambler Realty Co.[51] because this decision was the intellectual "open sesame" to land-use planning in this country. The idea that local governments could limit the height of buildings was sustained on the basis, inter alia, of Welch v. Swasey. That case had justified such limitations in terms of safety because the theoretical height to which buildings could be erected threatened to outstrip the capacity of contemporary firefighting technology to deal with conflagrations on their upper levels. The idea that nonresidential uses could be excluded from residential neighborhoods was seen as merely a natural progression from traditional nuisance-law theory which had always abhorred "a right thing in the wrong place,--like a pig in the parlor instead of a barnyard."[52] What is more, these new controls were justified in terms of health and safety.

Industry threatened a residential area with conflagration and heavy traffic. Parasites and near nuisances anyway, apartment houses blocked out the sun so as to destroy the healthful environment on residential-area playing fields, while the traffic they generated was a potential menace. Stores, moreover, only invited idlers and loiterers, when they did not breed rats, mice, fleas, and ants. Thus, in terms of a reasonable tool calculated to protect the public health, safety, and morals, the zoning idea was narrowly sustained as a reasonable exercise of the police power and then only in response to the need to protect private property from the harm unpolicied development should cause it[53].

2. The Courts' Rationale

Observe carefully how the Court rationalized zoning in terms of health, safety, and morals rather than from the broader perspective of a device designed to better the general welfare. This was typical of the approach taken by the justices at this particular time, bent as they were to checkmate legislative violations of the then-jurisprudentially sacrosanct notion that an unfettered market economy is the best litmus of right decision-making. Ultimately, of course, the caption, "general-welfare," was recognized again as a distinct end justifying the exercise of the police power[54]. As we shall see, this change was to broaden considerably the scope of the authority to zone, although until then the law reports were to contain their ration of sardonic humor as the judges struggled to fit zoning into the trinitarian litany of health, safety, and morals[55].

It has been observed that while zoning reached puberty along with the Stutz Bearcat and the speakeasy, and then shared the stage with F. Scott Fitzgerald and the Lindy Hop, zoning alone has survived unto this day wherein it remains viable still as the basic land-use planning device[56]. Even so, it must not be thought that like Mortmain, zoning caused "progress" to stand still. Rather, zoning has tended to channel development into relatively orderly patterns. Even so, it is said that an auto-body works recently occupied the site contested so bitterly in the Euclid case[57]. It is a fact that skyscrapers have continued to be built even higher, so much so that they again present a fire hazard, the original threat that justified imposing public regulations on the development of urban property in the first place[58]. Peculiarly enough, while zoning was devised as an answer to urban problems, it has become an integral device in the structure of suburban society[59]. If this were not enough, the ultimate paradox may have been reached when in 1970 the lead editorial in The New York Times bemoaned the fact that:

> "By definition, Fifth Avenue is that elegant, glittering, sophisticated artery that is the retail heart and shopping showcase of New York. News of the sale of Best & Co's building to developers for the construction of a new office tower opens the prospect for similar deals along the street. Like the other avenues, Fifth Avenue is to be turned into bland blocks of banks sleekly embalmed in a corporate pall."[60]

Thus it is that anyone concerned with the zoning mechanism must treat very seriously the admonition of Marcus Aurelius that "All things are now as they were in the day of those whom we have buried."

References cited in Part I

1. See particularly REPS, THE MAKING OF URBAN AMERICA, ch. 5 (1965).

2. NEW YORK CITY COMM'N ON BLDG. DISTRICTS AND RESTRICTIONS, FINAL REPORT 21-23 (1916):

> "While economic forces are quite effective in securing the segregation of the heavier type close to the water and rail terminals...light industries are scattered...One good residential section after another has been progressively invaded and destroyed by the coming of the sporadic factory....
>
> In the side streets along the lower portion of Fifth Avenue the number of employees is so great that the surrounding streets are congested...At the noon hour when the workers come out from the factories for a stroll along Fifth Avenue they monopolize the sidewalk to the exclusion or serious inconvenience of those having business on the avenue...."

See also BASSETT, ZONING 23-26 (1940).

3. DEFALONS, LAND-USE CONTROLS IN THE UNITED STATES 20 (1962).

4. See generally J. & H. JOYCE, LAW OF NUISANCES 520-521 (1906); McRae, "The Development of Nuisance Law in the Early Common Law," 1 U. FLA. L. REV. 27, 43 (1948).

5. Cantrel v. Church, Cro. Eliz. 846, 78 Eng. Rep. 1072 (Ex. 1601).

6. 3 BLACKSTONE, COMMENTARIES 222 (9th ed. 1783).

7. E.g., Hutchins v. Smith, 63 Barb. 251 (N.Y. Sup. Ct. 1872); Davis v. Lambertson, 56 Barb. 480 (N.Y. Sup. Ct. 1868).

8. Compare McCarty v. Natural Carbonic Gas Co., 189 N.Y. 40, 81 N.E. 549 (1907) (use of bituminous coal enjoined in Saratoga residential area) with Bove v. Donner-Hanna Coke Corp., 236 App. Div. 37, 258 N.Y. Supp. 229 (4th Dep't. 1932) (air polluting coke ovens not nuisance in Buffalo industrial area despite harm to neighboring home). For a discussion of these cases see Roberts, "From Common Law Logic-Chopper to Land-Use Planner: Eulogy for the Lawyer as Social Engineer," 53 CORNELL L. REV. 957, 970-974 (1968).

9. William Aldred's Case, 9 Co. Rep. 57, 77 Eng. Rep. 816 (K.B. 1611).

10. Fountainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc., 114 So.2d 357 (Fla. 1959), illustrates quite neatly the American principle that, absent some contractual or statutory obligation, a landowner has no legal right to the free flow of light and air across the adjoining land of his neighbor. Thus the Eden Roc Hotel was built on the parcel of land directly north of where the Fountainebleau Hotel already stood fronting on the Atlantic Ocean in Miami Beach. Soon thereafter, work began on the Fountainebleau site looking forward to an addition which

would occupy the north side of that site and which would run along the property line with the Eden Roc Hotel for almost its entire length. Some simple mathematical computations soon revealed that this new construction when completed would during the winter cast a shadow over the Eden Roc site for the rest of the day commencing shortly after noon. No more would the sun shine after morning on the Eden Roc's cabana, swimming pool and sunbathing areas during the peak months of the tourist season. The Eden Roc's owners were unable to obtain an injunction stopping the construction work because "where a structure serves a useful and beneficial purpose, it does not give rise to a cause of action...even though it causes injury to another by cutting off the light and air and interfering with the view." Id. at 359.

11. " [J] udicial zoning...carried out on a sporadic, hit or miss basis." CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY 292 (1962). See also Beuscher & Morrison, "Judicial Zoning through Recent Nuisance Cases," 1955 WIS. L. REV. 440, 442.

12. Thus, nuisance law today is being looked at anew through the prism of "Environmental Law." See, e.g., Juergensmeyer, "Control of Air Pollution Through the Assertion of Private Rights," 1967 DUKE L. J. 1126.

13. Schiro v. Oriental Realty Co., 272 Wis, 537, 76 N.W.2d 355 (1956). Cf. City of Miami v. City of Coral Gables, 233 So. 2d 7 (Fla. 1970).

14. E.g., R. v. White & Ward, 1 Burr. Rep. 333, 97 Eng. Rep. 338 (K.B. 1757).

15. E.g., UTAH CODE ANN. § 76-43-1 (Supp. 1971): "Whatever is dangerous to human life or health, and whatever renders soil, air, water or food impure or unwholesome, are declared to be nuisances and to be illegal, and every person...having aided in creating or contributing to the same...is guilty of a misdemeanor."

16. See generally ROBERTS, LAND USE PLANNING: CASES AND MATERIALS, Ch. 3 (1971).

17. Willison v. Cooke, 54 Colo. 320, 130 P. 828 (1913).

18. Id. at 328, 130 P. at 832 [Emphasis added].

19. Per Douglas J. in Berman v. Parker, 348 U.S. 26, 32-33 (1954).

20. NEW YORK (STATE) TEMPORARY STATE COMM'N ON THE CONSTITUTIONAL CONVENTION, INTRODUCTORY REPORT: 1967 CONVENTION ISSUES 15 (1966):

> "There is an important difference, however, between the federal government, whose powers are essentially confined to those granted by the states in the federal constitution, and the state government, which has all the sovereign powers not denied it by the federal constitution. A state constitution need not be concerned so much with the grant of powers to the state as with the restrictions the people wish to impose on the exercise of those powers. [Emphasis in original]."

21. See, e.g., COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 507 (1868) (police power designed to insure "the comfort, safety, or welfare of society").

22. See Shelton v. Tucker, 364 U.S. 479 (1960).

23. Willison v. Cooke, 54 Colo. 320, 329, 130 P. 828, 832 (1913).

24. Id. at 328, 130 P. at 831.

25. Id. at 330, 130 P. at 832.

26. MAKIELSKI, THE POLITICS OF ZONING 9-10 (1966).

27. Welch v. Swasey, 193 Mass. 364, 79 N.E. 745 (1907), aff'd, 214 U.S. 91 (1909).

28. See Willison v. Cooke, 54 Colo. 320, 130 P. 828 (1913), discussed supra at Ns. 23 et seq.

29. Ex parte Quong Wo, 161 Cal. 220, 118 p. 714 (1911).

30. BASSETT, ZONING 26-27 (1940): "Many eminent lawyers declared that zoning as proposed was a taking of property and not merely a reasonable regulation...."

31. See, e.g., Shasta Power Co. v. Walker, 149 Fed. 568 (N.D. Cal. 1906): Bloodgood v. Mohawk & H.R.R., 18 Wend. 9 (N.Y. 1837). Contra, Jacobs v. Clearview Water Supply Co., 220 Pa. 388, 69 A. 870 (1908).

32. Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co., 240 U.S. 30 (1916).

33. BASSETT, ZONING 27 (1940): "This would mean a laborious and expensive proceeding for almost every parcel of land...The method would be clumsy and ineffective." Even so, eminent domain was used to some extent in other parts of the country. E.g., City of Wichita v. Ware, 113 Kan. 153, 214 P. 99 (1923). See also City of Kansas City v. Kindle, 446 S.W. 2d 807 (Mo. 1969).

34. See, e.g. Reps, Pomeroy Memorial Lecture: "Requiem for Zoning," in BERGER, LAND OWNERSHIP AND USE: CASES, STATUTES, AND OTHER MATERIALS 823 (1968).

35. Hadacheck v. Los Angeles, 239 U.S. 394 (1915).

36. Id. at 410.

37. DELAFONS, LAND-USE CONTROLS IN THE UNITED STATES 15 (1962):

> "This decision determined the direction and limits of planning controls in America. The controls had to be such as would not justify compensation to individual owners, and they must bear a clearly demonstrable relation to the public health, safety or welfare."

38. BASSETT, ZONING 27 (1940): "The State legislature is the repository of the police power. The enabling act for zoning is the grant of this power to municipalities for regulating the height, area, and use of buildings, and the use of land."

39. ANTIEAU, MUNICIPAL CORPORATION LAW, Ch. VII. See also Delogu, "Beyond Enabling Legislation," 20 ME. L. REV. 1 (1968):

> "Although most state legislatures grant to local governments in broad language authority to deal with matters normally thought to be encompassed by the police power, these grants of authority have seldom been judicially interpreted to permit such measures as zoning, subdivision control, and official map ordinances."

40. E.g., Hiscox v. Levine, 31 Misc. 2d 151, 216 N.Y.S. 2d 801 (Sup.Ct. 1961) (cluster zoning not authorized by enabling legislation).

41. Ignaciunas v. Town of Nutley, 99 N.J.L. 389, 125 A. 121 (1924) (legislature itself did not then have the authority to license municipalities to exclude grocery stores from residential neighborhoods). See BASSETT, ZONING 16 (1940):

> "It was not until the constitution of the state was amended by a specific declaration in favor of the lawfulness of zoning that the courts of New Jersey upheld use zoning." See also id. at 18-19.

42. Lincoln Trust Co. v. Williams Bldg. Corp., 229 N.Y. 313, 317, 319, 128 N.E. 209, 210 (1920).

43. Id. at 318, 128 N.E. at 210.

44. See the statistics collected in DELAFONS, LAND-USE CONTROLS IN THE UNITED STATES 23 (1962).

45. Id. at 24; BASSETT, ZONING 28-29 (1940).

46. E.g., Ignaciunas v. Town of Nutley, 99 N.J.L. 389, 125 A. 121 (1924).

47. E.g., Lochner v. New York, 198 U.S. 45 (1905).

48. See, in order, A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Carter v. Carter Coal Co., 298 U.S. 238 (1936); United States v. Butler, 297 U.S. 1 (1936).

49. See particularly Ashwander v. TVA, 297 U.S. 288, 346-48 (1936) (concurring opinion).

50. McCormack, "A Law Clerk's Recollections," 46 COLUM. L. REV. 710, 712 (1946). For another version of the story see METZENBAUM, THE LAW OF ZONING 54-61 (2d ed. 1955). Whatever the real story may have been, it was unusual to see Mr. Justice Sutherland author an opinion from which Justices Van Devanter, McReynolds and Butler dissented. For a somewhat less than objective summary of the characters then sitting on the Court, see RODELL, NINE MEN, Ch. 7 (1955).

51. 272 U.S. 365 (1926).

52. 272 U.S. at 388.

53. E.g., DELAFONS, LAND-USE CONTROLS IN THE UNITED STATES 18 (1962):

> "It is a very significant fact that the American system of regulating private development--"zoning"--is a legacy of the 1920's, the heyday of free enterprise."

Consider, however, (id. at 23):

> "[I]t was as a means of strengthening the institution of private property in the face of rapid and unsettling changes in the urban scene that zoning won such remarkable acceptance in American communities."

54. Infra at n. 49.

55. E.g., McCarthy v. Manhattan Beach, 41 Cal. 2d 879, 264 P. 2d 932 (1953) (prohibition against beach-front homes set on piles sustained, inter alia, lest at night obscure area under the houses invite fornication).

56. BABCOCK, THE ZONING GAME 3 (1966).

57. HAAR, LAND-USE PLANNING: A CASEBOOK ON THE USE, MISUSE AND RE-USE OF URBAN LAND 174 (2d ed. 1971).

58. The design of new high-rise office buildings in Manhattan, for example, built as they are without windows which can be opened, causes occupants trapped above a fire to suffocate. See, e.g., N.Y. Times, Jan. 17, 1971, VIII, 1:1.

59. See particularly Stephenson, "Zoning, Planning and Democratic Values," in ZONING FOR MINIMUM LOT AREA 49-59 (2d ed. Stephenson, 1961).

60. N.Y. Times, Oct. 15, 1970, 46:1.

II. A BASIC OUTLINE OF ZONING AS A SYSTEM

> "[T]he zoning system simply refers to those behavior patterns and actors which have been associated with each other because of their tie to zoning as public policy."
>
> MAKIELSKI, THE POLITICS OF ZONING 4 (1966).

A. INTRODUCTION

Zoning is best appreciated as a process, involving as it does the activity of the local governing body which promulgates the ordinance, the administrative agencies which oversee the operation of the system and, perforce, their interaction with the owners of real estate subject to the scheme. Thus, at this point, it may be helpful to posit a typical zoning arrangement cast in a traditional mold. Such a tactic not only serves as an efficient introduction to zoning but provides a base upon which to adumbrate the many permutations which have recently appeared on the zoning scene.

B. THE ZONING ORDINANCE

1. The Concept of Use Districts

Fundamental to zoning is the idea that the community can be divided into districts in such a way that the landowners in each district will use their parcels in a harmonious way. In its rudimentary sense, zoning is really a prophylaxis against nuisances. Concomitantly, the early desire for order reflected a bias, derived from nuisance law, for maintaining tranquility in residential neighborhoods[1]. Thus it is that the most exclusive districts were and still are the single-family home districts, typically coded on zoning maps as "R-1 districts." Once this R-1 district was posited, less restrictive residential districts were conceived allowing in descending order for duplex housing (R-2), multiple dwellings and small apartment houses (R-3) and, finally, large scale apartment blocks (R-4). Observe now that it is appropriate to refer to this as a descending order of exclusiveness because, traditionally, zoning districts have been cumulative. That is, while only single-family homes are permitted in an R-1 district, an R-2 district allows for single-family homes and duplexes, while an R-4 district allows for all the uses specified in R-1 through R-3 and large scale apartment developments. Zoning therefore allowed for increasingly heterogeneous land use as the districts descended from the pinnacle of the single-family home district.

Of course, along with residential districts, commercial and industrial districts were created. Once more there were apt to be several subclasses of each of these districts, envisaging again a descending and accumulating scale of larger and less polite installations. Peculiarly enough, what with the cumulative principle still at work, it was perfectly permissible to build a single-family home in the lowest and last of the

industrial districts, an area that typically allowed for sewage disposal plants, garbage and refuse incinerators, scrap iron, junk, scrap paper and rag stowage, cemetaries, crematores, jails, and any manufacturing or industrial operation not allowed elsewhere. In point of practical fact, the very lowest industrial district tended to be regarded as a dumping ground into which all the land that could not otherwise be classified satisfactorily was put. It must be understood, however, that the early proponents of zoning did not see any conflict between the cumulative principle and this dumping ground technique which at face value envisaged housing in the worst conceivable environment[2]. Hidden here, perhaps, was the assumption that, if the district lines were drawn correctly, market-forces would ultimately cause each district to be exploited to attain its maximum potential and so perforce each residential, commercial and industrial district would evolve into a homogeneous and nuisance-free area. All in good time, or so it was thought, the apparent paradoxes inherent in the system would wither away[3].

Ominous, however, was a U-7 district in Euclid. "There is a seventh class of uses which is prohibited altogether."[4] Exiled to the hinterlands, presumably, were brick yards, gun powder factories and rendering plants: in other words, the very worst nuisance-style activities which, howsoever irksome, were necessary. The difficulty is that the farm country outside the reach of urbanization was being treated as the ultimate dumping ground for activities beyond the pale of co-existence in well ordered society.

2. Height and Area Districts

This inventory of use-districts did not exhaust the story by any means. First of all, a system of area districts was devised whereby minimum lot sizes were mandated, and the maximum utilization of lots was fixed. Thus while in two areas an R-1 use might be the only appropriate use, in one area a house could only be built on a one-acre parcel and then the house and garage could only occupy 15 percent of the lot area, while in another area a house could be built on a quarter-acre parcel and 50 percent of the lot area could be improved with a house and garage. Second, a system of height districts was devised, setting the maximum number of stories to which buildings could be constructed in various parts of the community. While there were differences between these various districts, it was axiomatic that within each district the regulations had to be uniform for each class of building.

3. The Zoning Map as Key to Translating the Ordinance

The reader should now appreciate Mr. Justice Sutherland's dictum in the Euclid case when, after verbally describing the ordinance that precipitated that litigation, he observed, "The plan is a complicated one and can be better understood by an inspection of the map...."[5] This observation was particularly perceptive because zoning ordinances typically are made up of two crucial parts. The ordinance itself defines concepts, such as what is a "single family," and articulates formulae by which permissible horizontal and vertical area utilizations can be calculated. In order, however, to grasp the plan for the community as a whole, to grasp the "big picture" as it were, it is usually essential to look at the map annexed to the ordinance whereon the various districts are illustrated. Indeed, as a practical matter, to the extent that zoning is planning, the plan as an operative whole is only rendered articulate on the map upon which these sundry concepts have been imposed.

C. OPERATING THE ZONING SYSTEM

1. Creation of an Administrator

Obviously it is not enough that the local legislature promulgates a zoning ordinance. A system, in order to function, must have staff to operate it. So it is with zoning. In order to have a viable scheme, no one should build in violation of it. This truism indicates the obvious conclusion that the local building commissioner should assume the role of "Zoning Enforcement Officer." For safety reasons there already existed an official with whom plans to build had to be cleared in order to test their compliance with the building code. It would be a simple matter, therefore, for him to look at the zoning map in order to assay that the proposals before him complied as well with the zoning scheme.

2. Creation of an Agency Empowered Occasionally to Grant Variances

In articulating a zoning scheme, it was obvious that the district lines drawn on a map would make sense only as a whole. The very notion of a district, after all, entails viewing the community in fairly broad terms and not concentrating on a lot-by-lot analysis. Of necessity, therefore, a few parcels in any given district might not be suitable for development according to the criteria set for the district as a whole. To deny the right to develop in a different way, when economics dictated that compliant development was impracticable, would amount to confiscation of these odd lots and, perforce, as to them the zoning law would be an unconstitutional imposition of the police power. Rather than leave these lots unregulated, it was deemed appropriate to channel these problems into the system under the aegis of an agency which, upon application, could grant dispensations from the local district rules. Thus was born an administrative agency, variously known as a Board of Adjustment, Zoning Commission or Board of Zoning Appeals, empowered to grant "variances" which entitled particular property owners to develop their parcels in ways varying from the strict letter set down for their own local district. By and large this body, not untypically appointed by the mayor and serving without compensation, had the power to maintain the districts intact by only grudgingly granting variances or to render the district farcical by granting variances wholesale. Lest the exception become the rule and, via the variance, the local board rezone the community at their whim, the courts interposed themselves and developed an extremely complicated process of judicial review, all of which was designed to make certain that these boards responded to the exceptional case and did not in fact seize the chance to exploit their authority to redraft the zoning scheme to their own tastes[6].

3. Allowing for Legislative Leeway to Update the System

It was obvious, of course, that things change so that uses which were incompatible today might become compatible tomorrow. Again, while certain land might not today be suitable for high-rise construction, a technological innovation tomorrow might make it ideally suitable for such development. A zoning ordinance, calculating as it does the most practical development of a community, is at best an educated guess as to how development will proceed. Yet changes of opinion about what is the appropriate way for a community to develop illustrate remarkable turnabouts. Apartment

houses, for example, denigrated as "near nuisances" in Euclid[7], are now espoused by some as eminently suitable fixtures in residential neighborhoods[8]. Change is a rule of life and, obviously, provision had to be made to amend the zoning scheme. Thus was born the idea that, like any ordinance, the zoning pattern could be amended by the local legislature which had promulgated it. Even so, this axiomatic truth has not been without its problems, given the American experience that local legislatures can behave in highly partisan and highhanded fashion. Thus, as with variances, there has developed a huge series of judicial review cases, the overall thrust of which has been to insure that amendments are undertaken on "neutral planning principles" as opposed to "parochial political favoritism."[9]

D. THE ZONING SYSTEM SEGREGATED FROM THE PLANNING FUNCTION

1. Separate Enabling Legislation

It is essential to realize that zoning evolved straightjacketed within its own enabling legislation quite distinct from the broader planning function. This bifurcation of zoning and planning in separate functions was confirmed when, along with the Standard State Zoning Enabling Act, the U.S. Department of Commerce published separately a Standard City Planning Enabling Act. This segregation has continued to this day, witness the fact that new enabling legislation governing both zoning and planning enacted in Pennsylvania as recently as 1968 continued to isolate zoning as a distinct system of controls administered separately by a zoning officer and a zoning hearing board[10].

2. The Planning Commission and Subdivision Controls

The planning function evolved out of the fact that, authorized by appropriate enabling legislation, a municipality could impose controls upon persons seeking to subdivide and develop land. In fact, these controls predated zoning. A developer typically has to satisfy the local planning commission that the internal streets in the subdivision will be in safe alignment with existing thoroughfares and that the drainage within the subdivision will be adequate. These restraints, like zoning, are police-power-rooted mechanisms designed to protect the public health and safety. But planning commissions can go further and require a developer to build the streets internal to his subdivision and then dedicate them. He can also be required to dedicate land on the periphery of his project to expedite widening already existing public streets in the future, and he can be required to dedicate portions of his land for school and park purposes. Premised as they were on the notion that subdividing land was a privilege rather than a right, these exactions were seen to exceed traditional police power authority and to rest in part at least on both the eminent domain power and the power to levy special taxes and assessments. Premised as it was then on a different rationale, there was ample reason to see planning as a discipline quite distinct from the narrower zoning regimen[11].

3. The Planning Commission and Master Planning

The planning commission does more than oversee developers. It also is charged with the task of developing a master plan for the community. In part, a master plan is a projection of when and where new public utilities ought to be built. This kind of decision will have a profound impact on

future community development, witness how quickly the installation of water and sewer lines can convert agricultural land into terrain ripe for residential development. In part, it is a similar set of projections about future street plans and land-use plans[12]. But the master plan is more than a collection of these various projections. The whole point of the exercise is to order these parts around a central core of statements idealizing what kind of community overall is being envisaged and planned. The master plan is really a device designed to cause the promulgation of a "statement of objectives of the municipality concerning its future development."[13] Once the master plan is adopted by the local legislature it does not have the force of "law" that a zoning ordinance has. Rather, the idea is that local governmental decisions should now take place oriented around the praxis or program encapsulated in the plan. These decisions should tend not to conflict with the ultimate goals envisaged in the plan, and they should tend toward its implementation.

4. Traditional Zoning Not in Accord with the Master Plan

At first blush it would seem self-evident that in preparing a zoning ordinance the master plan should provide the basis for the entire scheme. Zoning enabling legislation ordains that zoning should reflect a "comprehensive plan"[14]. Presumably, therefore, the answer to the simple question whether the zoning scheme reflects the need to achieve the goals set by the master plan would afford a neat test whether the scheme did illustrate a comprehensive plan. This is precisely what has not been done. Instead most courts have examined the zoning scheme standing alone and have been satisfied that a comprehensive plan existed so long as the scheme, evaluated in a vacuum, was a reasonable prescription for orderly development and not a wholly arbitrary exercise[15].

History illuminates why it was that zoning schemes were not evaluated in terms of a master plan. Until recently most communities simply did not have a master plan and, outside large cities, the notion of having a plan only became respectable when the federal government began to condition many of its grants and aids upon proof of on-going planning activity. To have equated zoning's need for an ordinance promulgated according to a comprehensive plan with the existence of a master plan would require the court to "invalidate zoning ordinances <u>in toto</u>, for many communities set about instituting zoning ordinances before a master plan had been prepared or even contemplated."[16] Again, of course, this existential situation tended to confirm the wisdom of treating zoning as a self-contained activity.

5. Zoning Subject to the Master Plan in the Future

The law governing this subject is on the verge of dramatic change. Dissatisfaction with what is seen to be a deteriorating environment has generated dissatisfaction with what is seen to be a fragmented and ineffective planning system. Inevitably, along with the felt need for more and better planning, zoning will be brought into harness with planning generally[17]. Recent developments in California reveal the direction in which the law is moving. First, local governments will have to develop general plans serving as guidance systems around which to make decisions with regard to the control of land-use and the provision for new highways and

public utilities[18]. Second, zoning ordinances, whether new ones or substantial revisions of old ones, will have to illustrate conformance with the community's general development plan[19].

References cited in Part II

1. Euclid v. Ambler Realty Co., 272 U.S. 365, 390-395 (1926); Fraser v. Parker Funeral Homes, 201 S.C. 88, 96-97, 21 S.E. 2d 577, 581 (1942) ("No higher use could be made of a piece of property than to have established thereon this greatest of all institutions, the home.") The Supreme Court has recently ratified this theme, sustaining a local ordinance which defined a single family so as to exclude more than two unrelated persons occupying a home. In so doing, Mr. Justice Douglas waxed eloquent about "zones where family values, youth values, and the blessings of quiet seclusion, and clean air make the area a sanctuary for people." Village of Belle Terre v. Boraas, ___U.S.___, 39 L. Ed. 2d 797, 804 (1974).

2. Bassett, "Zoning," 9 NAT. NUM. REV. 315, 325 (1920):

   "[T]he surroundings are unhealthful and residences in such locations are almost sure to become neglected and unsanitary [yet] the residences do not hurt the neighboring factories, and the grounds of prohibition cannot be based on the [nuisance law] maxim that one should so use his own land as not to injure another."

3. BASSETT, ZONING 105 (1936):

   "Zoning has sought to safeguard the future, in the expectation that time will repair the mistakes of the past."

4. Euclid v. Ambler Realty Co., 272 U.S. 365, 383 (1926).

5. Id. at 383.

6. E.g., Otto v. Steinhilber, 282 N.Y. 71, 75-76, 24 N.E. 2d 851, 852-853 (1939):

   "Before the Board may exercise its discretion and grant a variance upon the ground of unnecessary hardship, the record must show that (1) the land in question cannot yield a reasonable return if used only for a purpose allowed in that zone; (2) the plight of the owner is due to unique circumstances and not to the general conditions in the neighborhood which may reflect the unreasonableness of the zoning ordinance itself; and (3) that the use to be authorized by the variance will not alter the essential character of the locality.

7. Apartments in R-1 areas characterized as "mere parasite [s], constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district." Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 394-395 (1926).

8. "Whether it is generally desirable that garden apartments be freely mingled among private residences under all circumstances, may be arguable. In view, however, of Tarrytown's changing scene and the other substantial reasons for the board's decision, we cannot say that its action was arbitrary or illegal." Rodgers v. Village of Tarrytown, 302 N.Y. 115, 126, 96 N.E. 2d 731, 736 (1951). See also Appeal of Girsh, 437 Pa. 237, 263 A. 2d 395 (1970), where the Supreme Court of Pennsylvania held unconstitutional a zoning ordinance that failed to provide for apartment dwellings except by variance.

9. See, e.g., Udell v. Haas, 21 N.Y. 2d 463, 235 N.E. 2d 680 (1968).

10. See generally Krasnowiecki, Zoning Litigation and the New Pennsylvania Procedures, 120 U. PA. L. Rev. 1029, 1032 (1972): "[N]othing has been done to abolish the distinctions that exist between various regulatory activities on the local level, such as zoning and subdivision control. The cumbersome and divisive distribution of powers and functions..established by the Standard Acts of the 1920's, is continued as before."

11. See generally Johnston, Constitutionality of Subdivision Control Exactions: The Quest for a Rationale, 52 CORNELL L. Q. 871 (1967); Reps, Control of Land Subdivision by Municipal Planning Boards, 40 CORNELL L. Q. 258 (1955).

12. CAL. GOV. CODE § 65302 (Supp. 1974):

"The general plan shall consist of a statement of the development policies and shall include a diagram or diagrams and text setting forth objectives, principles, standards, and plan proposals. The plan shall include the following elements:

(a) A land-use element which designates the proposed general distribution and extent of the uses of land for housing, business, industry, open space, including...public buildings and grounds....

(b) A circulation element consisting of the general location and extent of existing and proposed major thoroughfares, transportation routes, terminals, and other local public utilities and facilities, all correlated with the land-use element of the plan.

(c) A housing element....

(d) A conservation element....

(e) An open-space element....

(f) A seismic safety element....

(g) A noise element....

(h) A scenic highway element...."

13. VT. STAT. ANN., tit. 24 §4382 (a) (1) (Supp. 1974).

14. Standard State Zoning Enabling Act §3 (U.S. Dep't of Commerce, rev. ed. 1926) ("Such regulations shall be made in accordance with a comprehensive plan....")

15. See particularly Udell v. Haas, 21 N.Y. 2d 463, 471-72, 235 N.E. 2d 897, 902 (1968):

"No New York case has defined the term 'comprehensive plan.' Nor have our courts equated the term with any particular document... As the trial court noted, generally New York cases 'have analyzed the ordinance*** in terms of consistency and rationality....'"

16. POOLEY, PLANNING AND ZONING IN THE UNITED STATES 18 (1961).

17. See Reps, Requiem For Zoning, available from Center for Urban Development Research, Cornell University, Ithaca, N.Y.

18. CAL. GOV. CODE §65100 (Supp. 1974):

"By ordinance the legislative body of each county and city shall establish a planning agency."

CAL. GOV. CODE §65300 (Supp. 1974):

"Each planning agency shall prepare and the legislative body of each county and city shall adopt a comprehensive, long-term general plan for the physical development of the county or city...."

19. CAL. GOV. CODE §65860 (Supp. 1974):

(a) County or city zoning ordinances shall be consistent with the general plan of the county or city by...January 1, 1974....

Compare Ariz. Rev. Stat. Ann. §9-462.01E (Supp. 1974):

All zoning ordinances or regulations adopted under this article shall be consistent with the adopted general plan and specific plans of the municipality, if any, as adopted under Article 6.

See also Nev. Rev. Stat. §278.250 (Sess. Laws 1973).

III. THE PARAMETERS OF ZONING

> "Zoning is a tool in the hands of governmental bodies which enables them to more effectively meet the demands of evolving and growing communities. It must not and cannot be used by those officials as an instrument by which they may shirk their responsibilities."
>
> -National Land & Investment Co., v. Easttown Township, 419 Pa. 504, 215 A.2d 597 (1965)

A. ZONING AND THE GENERAL WELFARE

1. The Scope of the Authority to Zone

Throughout the Nineteenth Century it seemed clear that a state legislature could exercise its police power authority to achieve objectives capable of being encapsulated within the rubric of health or safety or morals or general welfare. A railroad, for example, owned a bridge over a stream, but subject to the public right in the waterway. The state legislature conceived of an irrigation project to increase the supply of tillable land. This project would involve broadening the stream channel, which in turn would require the railroad to replace its bridge with a new longer one. The railroad attacked the legitimacy of the project precisely because it did not involve health, safety or morals. According then to the railroad, the general welfare standing by itself would not justify the exercise of the police power. The first Mr. Justice Harlan demolished this thesis:

> "We cannot assent to the view expressed by counsel. We hold that the police power of a State embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety.... The foundations upon which the power rests are in every case the same."[1]

This sweeping canon, however, did not last.

While the details need not detain us, it remains a fact that between 1917 and 1934 the Supreme Court took a very narrow view of legislative authority to tinker with an economy the judges thought best controlled by its own immutable laws[2]. The net result was that state legislatures were restricted to matters of immediate concern to the public health, safety, and morals while their authority over the general welfare suffered an eclipse. Euclid was a product of this era, hence the extended analysis in terms of health and safety, and even the doubt over the result of the case until it was announced. Ultimately, of course, a confrontation between the executive and the judicial branches of the federal government led to a recasting of the law.

The New Deal controversy did cause the Court to confirm again that state legislatures could concern themselves with the economic well being of

the community. General welfare tended to make its reappearance on the jurisprudential stage in the garb of economics. When New Orleans, for example, imposed architectural controls on the Vieux Carre, regulations that did not better the public health and safety, and certainly were not directed at improving the public morals, the litany ran like this:

> "The preservation of the Vieux Carre...is a benefit to the inhabitants of New Orleans generally, not only for...sentimental value...but for its commercial value as well, because it attracts tourists and conventions to the city...."[3]

This "tourist trap" rationale has subsequently been repeated elsewhere[4].

This precise issue was not settled again in Pennsylvania, for example, until 1958[5]. The question arose when the owner of a large home insisted upon her right to convert it into a rooming house, notwithstanding the fact that the district was zoned for single-family residences only. The petitioner argued that police power restraints could not be imposed upon her property to inhibit her decision-making capacity, because a rooming house did not entail a threat to the public health, safety or morals. The court disposed of this argument by citing the thesis laid down much earlier by the elder Harlan in the Chicago railway case[6]. Omen for the future, Justice Bell dissented and warned that licnesing state legislatures to regulate properly under the guise of bettering the general welfare was tantamount to recognizing an "unlimited police power."[7]

Crucial to Pennsylvania's decision that the general welfare caption justified the exercise of the police power over real property was the Supreme Court's own decision several years earlier in Berman v. Parker[8]. In this case the owner of a sound building located in a blighted area of Washington, D.C. contested the authority of a local public agency to condemn the building as part of an urban renewal scheme. The controversy came to be phrased in terms of the police power, condemnation being treated merely as a tool, selected in lieu of a regulatory approach, to attack the problem of urban blight.

> "The power of Congress over the District of Columbia includes all the legislative power which a state may exercise over its affairs...We deal, in other words, with what traditionally has been known as the police power...."[9]

This being the case, the usual grounds of health, safety, and morals would seem to have justified the exercise of government authority. Indeed, given the palpable existence of health and safety ends to be achieved, the only issue would seem to have been whether in order to expedite the reconstruction of a blighted neighborhood it was reasonable to include for seizure even the occasional sound buildings within the project area. Mr. Justice Douglas, however, chose the occasion to concoct an expansive thesis.

> "Public safety, public health, morality, peace and quiet--these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it...Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may indeed make living an almost insufferable burden....

> ...The concept of the public welfare is broad and inclusive....The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well balanced as well as carefully patrolled....If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way."[10]

This then describes the full sweep of the police power.

Since Berman v. Parker it has been axiomatic that

> "conscientious municipal officials have been sufficiently empowered to adopt reasonable zoning measures designed towards preserving the wholesome and attractive characteristics of their communities and the value of taxpayers' properties."[11]

Thus communities can, to preserve their overall character, fix reasonable minimum lot areas[12], minimum floor areas for residential dwellings[13], and segregate trailer parks into special zones[14].

2. Exclusionary Zoning

Increasingly criticism has been heard that some suburban communities have exploited their authority to zone to exclude newcomers from their precincts. Some communities have in fact opted to preserve their "character" to the extent of requiring four- and five-acre minimum lot zoning in single family residence districts and excluding entirely apartment house developments. Pennsylvania's highest court has been the most active in striking down overly restrictive zoning ordinances "whose primary purpose is to prevent the entrance of newcomers in order to avoid future burdens, economic or otherwise, upon the administration of public services and facilities."[15] In actuality, however, Berman v. Parker licensed the broad view of zoning to achieve, not suburban exclusivity, but "well balanced" communities[16]. Thus, as ever, while growth can be channeled, it cannot be aborted by zoning.

> "...nor shall private property be taken for public use, without just compensation."

B. THE FIFTH AMENDMENT

1. Introduction

The legislature can enact measures to protect the general welfare, and at first thought the scope of this authority would seem to be circumscribed only by the capacity of the lawyers to concoct a general welfare justification for any particular enactment. A state legislature might not unreasonably conclude that media violence contributed to the increase in crime and so set up a system of censorship. The end would clearly involve the general welfare and the means would be reasonably adapted to achieve the end. Even so, the enactment would be void because the due process standard in the Fourteenth Amendment, which applies to the several states, includes

the basic civil liberties enumerated in the Bill of Rights, among them being the guarantees of free speech and press.

Precisely this kind of situation occurred on the zoning scene in 1974. The zoning ordinance of a tiny village restricted occupants of single-family homes to traditional families or not more than two unrelated persons. Six students from a nearby university rented a house within the village and, when the authorities objected, they tried to concoct a constitutional argument to overturn the ordinance, asserting that it abridged their "rights" of association, travel, and privacy. The Supreme Court refused in this context to find that the students had any fundamental rights that were being abridged. In fact, Mr. Justice Douglas again waxed eloquent over the objectives a local legislature might seek to attain under the umbrella of general welfare:

> "A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land use project addressed to family needs. This goal is a permissible one within Berman v. Parker...The police power is not confined to elimination of filth, stench and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion, and clean air make the area a sanctuary for people."[17]

Given the appropriate general welfare objective, moreover, the means adopted were reasonable. A line had to be drawn somewhere defining family, after all, and any line leaves out someone who might have otherwise been included. "That exercise of discretion...is a legislative, not a judicial function."[18]

The Fifth Amendment, however, provides that governments cannot take private property for a public use without the payment of just compensation. It is precisely this constitutional check upon the scope of legislative authority justified in terms of the general welfare that must concern us.

2. Pennsylvania Coal Company v. Mahon[19]

Life would be simple if a state legislature possessed two distinct powers, namely, the authority to regulate the use of land to protect the general welfare and the authority to condemn land upon the payment of market value. In simpler times, it did appear that these two powers were quite distinct. Thus, the Kansas legislature once adopted prohibition in the name of the general welfare and to this end outlawed even the manufacture of intoxicants. The difficulty was that this left a manufacturer with a worthless brewery on his lands, a result he characterized as a "taking" of property without the payment of just compensation.

Again it was the first Mr. Justice Harlan who reasoned that this argument had no merit. First, the government had not actually taken possession of the plant. Second, it being nigh unto a public nuisance anyway, there were no vested property rights involved in the brewery. Thus:

> "The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use...."[20]

All well and good: a public nuisance had no rights. This was illustrated again when in the Hadacheck case the court sustained the Los Angeles ordinance prohibiting the manufacture of bricks within the city limits, a regulation that overnight reduced the value of a parcel of land from $800,000 to $60,000[21]. A zoning ordinance often enough reduces the value of land, as where a lot is restricted to residential use when it would be much more valuable if it could be used as a commercial site. But what if, given a non-public nuisance situation, land-use controls were to totally destroy the value of a parcel?

The law of Pennsylvania at one time was peculiar in that it divided a fee simple into three "estates": surface rights, mineral rights, and support. What this meant was that a coal company which owned the last two estates could mine without regard to the harm subsidence would cause the surface owner. Concerned over the safety of the surface dweller, that state's legislature exercised its police power to forbid mining under dwellings. Here then was a regulation which, like the Kansas one, rendered certain property, in this case mineral rights, worthless. But in this case Mr. Justice Holmes condemned the enactment.

> "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[22]

Pushed too far then, regulations imposed upon land use become void because they are tantamount to uncompensated takings of real estate.

3. The Taking Calculus

Diminution in the value of land caused by the imposition of regulations is not the litmus signalling that an unconstitutional taking is occurring. "There is no set formula to determine where regulation ends and taking begins."[23] The test is said to be one of reasonableness[24]. Be that as it may, as a rule of thumb a regulation becomes confiscatory when the owner of land cannot realize a reasonable return on his parcel as zoned.

Averne Bay Construction Company v. Thatcher[25] is a classic illustration of a regulatory scheme that ran afoul the taking rule. A section of Brooklyn, not yet developed, was zoned exclusively for single-family residences long before urban overspill made residential development likely. In practical effect, this area became a land bank ready for future use and was protected meanwhile from commercial developments which, when the time came, would spoil its residential potential. Plaintiff owned a parcel of land in the district and found that there was no profitable use to which he could put his parcel in the immediate future. While no one is entitled to the highest possible return on his parcel, plaintiff sued to have this ordinance declared void. The court agreed.

> "An ordinance which permanently so restricts the use of property that it cannot be used for any reasonable purpose goes, it is plain, beyond regulation, and must be recognized as a taking of the property."[26]

Thus objectives properly encompassed within notions of general welfare may not always be accomplished by zoning.

Early efforts to create flood zones generated considerable litigation along this line. The New Jersey decision in Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills[27], has become a classic. A township amended its zoning scheme to create a meadowlands zone in order to preserve its swamplands as water-holding areas. The only uses permitted as of right in the new zone were greenhouses, agriculture, wildlife sanctuaries, and the like. Other uses consistent with keeping intact the zone were allowed by special permit. When he was not allowed a permit to fill his parcel in order to put it to intensive commercial development, a landowner went to court and prevailed.

> "While the issue of regulation as against taking is always a matter of degree, there can be no question but the line has been crossed where the purpose and practical effect of the regulation is to appropriate private property for a flood water detention basin or open space. These are laudable public purposes...[b]ut such factors cannot cure basic unconstitutionality."[28]

Paradoxically, plaintiff was entitled to his profit even though his use might inflict harm on others. Mr. Justice Holmes, however, would have said that the danger of flood damage to the public was no excuse to shift the damages over onto this property owner. Reform could, after all, be achieved by taking the land for a public use and paying for it[29].

Whereas Morris involved an upstream lot, Dooley v. Town Plan & Zoning Commission[30] involved a shore parcel which its owner wanted to subdivide for housing. The Fairfield zoning ordinance allowed only for uses such as marinas, truck and nursery gardens, and playgrounds. In light of potential floods, there was a purpose behind the scheme, but it was held void as confiscatory because it diminished the owner's property value by 70 percent. The same result obtained when Maine attempted with its Wetlands Act to prohibit a landowner from filling and subdividing his tract of undeveloped coastal marshland[31].

The net result of all this has been to teach that certain restraints imposed upon land, howsoever laudable, will fail as regulations. The clear-cut alternative strategy is to achieve the same public purpose by condemnation. The lack of available monies, however, often renders the alternative academic. Thus there have evolved intermediate strategies. Government may acquire partial interests in land, such as easements, to achieve the purpose at hand at reduced expense. Taxes may be manipulated to create incentives for an owner who puts his parcel to the desired use. Thus land-use controls have become a continuum of controls running a gamut from pure takings to pure regulations, with many a variant between the poles.

4. Environment as Catalyst of a New Calculus?

It is interesting to note that the New Jersey court recently suggested that the Morris County Land[32] case might have to be re-examined.

> "The approach to the taking problem, and the result, may be different where vital ecological and environmental considerations of recent cognizance have brought about rather drastic land use restrictions in furtherance of a policy designed to protect important public interests...."[33]

This is a prophecy well worth a moment's notice.

It has been suggested that there is a key to the taking cases which runs as follows. The police power can be exerted, like nuisance law, to stop A from exploiting his land when it entails harming his neighbor, B. Thus, in a residential area, A can be restricted to a residential use. A's lot could not, however, be zoned for use exclusively for park purposes. In this situation, the public would be trying to make A confer a benefit upon the public at his private expense. Thus, in Morris County Land, the public were trying to get water catchment areas for their benefit at A's expense, a "taking" according to this thesis. What, however, if harm to the public was postulated when waterways were polluted? Would not the analysis now indicate that A could be prevented from filling swamp land if such an action caused ecological harm to the public?

The Wisconsin decision in Just v. Marinette County[34] is extremely significant in this regard. A county ordinance divided shorelands into general purpose, general recreation, and conservancy districts. The conservancy districts were postulated upon those parcels designated as swamps or marshes on United States Geological Survey maps. Uses permitted as of right in these conservancy districts were limited to the harvesting of wild crops, forestry, and fishing. Any use that would involve filling or dredging required special permission. Notwithstanding this scheme, the owner of a parcel within a conservancy district commenced a fill operation, a violation that precipitated both a fine and an injunction. Inevitably, on appeal, the property owner sought to have the ordinance categorized as a taking.

The court took the position that a taking only occurred when government through restricting land use sought to obtain a public benefit. Quite properly, however, the police power could be used to prevent a landowner from causing harm to the public. The public in this case, however, had rights in the unpolluted waters of the state. Thus,

> "In the instant case we have a restriction on the use of a citizen's property, not to secure a benefit for the public, but to prevent a harm from the change in the natural character of the citizen's property."[35]

But this was only part of the story.

While standing by itself the dimunition in value of the land caused by the imposition of regulations is not controlling, the enormity of this figure always looms large in the taking calculus. Traditionally this figure is calculated in terms of what the land would be worth if it could be developed minus its value subjected to the regulations. This has really meant measuring the owner's potential gain which he might realize if let alone by the authorities. The Wisconsin court, however, did not allow the Justs to use this potential. Instead

> "While loss of value is to be considered in determining whether a restriction is a constructive taking, value based on changing the character of the land at the expense of harm to the public rights is not an essential factor or controlling."[36]

Rather, the "true" or "unregulated value" of the parcel should be calculated in terms of its value in its natural state. Removing the owner's speculative gain from the calculus removes a factor which, while not controlling, often enough compelled the conclusion that an ordinance was confiscatory.

Even more significant in the long run, perhaps, was the thinking involved in removing speculative gain from the equation. Land, like any other commodity, has been valued in terms of cash value, and this value includes its potential development value. The taking cases have tended to protect these speculative values as part and parcel of the very notion of property rights. In Just the Wisconsin court called into question this traditional conception of property.

> "Is the ownership of a parcel of land so absolute that man can change its nature to suit any of his purposes?...An owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others. The exercise of the police power in zoning must be reasonable and we think it is not an unreasonable exercise of that power to prevent harm to public rights by limiting the use of private property to its natural uses."[37]

Accepted at face value, Just has removed the taking constraint when the general welfare basis of the exercise of the police power pertains to subject-matter susceptible to categorization in terms of the public right in a decent environment. The case potentially is so revolutionary that one is forced to wait upon developments before assaying its true parameters.

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2. See Adams v. Tanner, 244 U.S. 590 (1917); Nebbia v. New York, 291 U.S. 502 (1934).

3. New Orleans v. Pergament, 198 La. 851, 858, 5 So. 2d 129, 131 (1941).

4. Sante Fe v. Gamble-Skogmo, Inc., 73 N.M. 410, 389 P.2d 13 (1964); Opinion of the Justices to the Senate, 333 MASS. 773, 128 N.E 2d 557 (1955).

5. Best v. Zoning Board of Adjustment, 393 Pa. 106, 141 A.2d 606 (1958).

6. See note 1 supra.

7. 393 Pa. at 120, 141 A 2d at 614 (emphasis in original).

8. 348 U.S. 26 (1954).

9. Id. at 31-32.

10. Id. at 32-33.

11. Pierro v. Baxendale, 20 N.J. 17, 30, 118 A 2d 401, 408 (1955).

12. Bilbar Construction Co. v. Easttown Township, 393 Pa. 62, 141 A 2d 851 (1958). But see National Land & Investment Co. v. Easttown Township Board of Adjustment, 419 Pa. 504, 215 A. 2d 597 (1965).

13. Lionshead Lake, Inc. v. Township of Wayne, 10 N.J. 165, 89 A. 2d 693 (1952).

14. People v. Clute, 18 N.Y. 2d 999, 224 N.E. 2d 734 (1966).

15. National Land & Investment Co. v. Easttown Township Board of Adjustment, 419 Pa. 504, 215 A 2d 597 (1965).

16. See quote supra at n. 10.

17. Village of Belle Terre v. Boraas, ___U.S. ___, 6 ERC 1417, 1419 (1974).

18. Ibid.

19. 260 U.S. 393 (1922).

20. Mugler v. Kansas, 123 U.S. 623, 668-669 (1887).

21. See p. 11 supra.

22. Pennsylvania Coal Company v. Mahon, 260 U.S. 393, 415 (1922).

23. Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962).

24. City of St. Paul v. Chicago, St. P., M. & O. Ry., 413 F.2d 762 (8th Cir. 1969), cert. den. 396 U.S. 985.

25. 278 N.Y. 222, 15 N.E. 2d 587 (1938).

26. Id. at 232, 15 N.E. 2d at 592.

27. 40 N.J. 539, 193 A. 2d 232 (1963).

28. Id. at 555, 193 A. 2d at 241.

29. Pennsylvania Coal Company v. Mahon, 260 U.S. 393, 415-16 (1922).

30. 151 Conn. 304, 197 A.2d 770 (1964).

31. State v. Johnson, 265 A.2d 711 (me. 1970).

32. See note 27 supra.

33. AME Associates v. Township of Springfield, ___N.J.___, 319 A.2d 705, 711 N. 4 (1974).

34. 56 Wis.2d 7, 201 N.W.2d 761 (1972).

35. Id. at 16, 201 N.W.2d at 767.

36. Id. at 23, 201 N.W.2d at 771.

37. Id. at 17, 201 N.W.2d at 768.

IV. THE DEVELOPMENT OF ALTERNATIVE METHODS OF LAND USE CONTROL

"The rule is, jam tomorrow and jam yesterday--but never jam today."

-Through the Looking Glass

A. EARLY AGRICULTURAL ZONING

Zoning tends to be an urban phenomenon, adopted as it is by local governments only when a multitude of conflicting uses requires the imposition of some sort of control over land use. Meanwhile, however, the slowly expanding tide of urbanization causes developers to move farther outside already built-up areas to create new housing estates. When developers jump ahead of the urban tide and move into "rural" areas, they seek to acquire the flattest and, perhaps, best farm land preparatory to converting it into housing estates. The necessity to provide the public services--schools, police, fire--needed by the newcomers attracted by this housing in turn causes real estate taxes to rise, which in turn causes even more farmers to sell out to developers.

Rural communities can, of course, enact their own zoning regimes premised upon the priority of the exclusively agricultural district instead of the urban-oriented single-family residence district. Commercial and industrial uses can be excluded from these districts, although nothing directly forbids someone buying a farm and using it for a home. California, however, has recognized the utility in agricultural districts of minimum lot area zoning of five acres[1] and, more recently, eighteen acres[2]. No one can obtain a permit to build a new home in this last district until he has acquired an eighteen-acre estate, a device that effectively excludes most residential newcomers and keeps land in farm use. At the same time, a residential subdivider interested in even a five-acre-lot style housing estate is stymied. Given the agricultural character of the area and the perceived need to preserve agricultural land, this exercise of the police power can be justified in rural areas when the same large lot technique would be characterized as exclusionary zoning in the suburbs proper[3].

It is said that the farmers in California's Santa Clara County were among the first to perceive the need for agricultural zoning, threatened as they were by the overspill from San Francisco[4]. This early "greenbelt zoning" not only required that the land be designated for agriculture on the county master plan, but required the owners' consent before the local legislature could zone it agricultural[5]. In addition, an adjoining city could not annex these lands without the consent of two-thirds of the owners affected thereby[6]. Thus any tax assessment of these lands should have to be calculated in terms exclusively of their value in purely agricultural terms and not their potential value as housing lots. Yet the owners who did not consent could develop subdivisions, causing the tax rate itself to rise throughout the county to pay for increased services.

While the program seems to have worked at first, second thoughts about it were caused when the developers upped their offers to buy from $3,000 an acre to $8,000 or $10,000. There appears to have developed then

a process whereby enough consents could be obtained and portions of the greenbelt annexed to a city, and thence rezoned for residential subdivision[7]. This should not come as a surprise, because traditional zoning has not locked land use into a mold forever permanent. Zoning channels development in such a fashion as to reduce conflict; it does not halt development. In Euclid[8], for example, the original zoning ordinance preserved the main avenue as a residential thoroughfare and channelled industrial development along a railway corridor farther north. Today the site of the Euclid controversy is occupied by an automobile body works, and the village has become a thoroughly urbanized segment of the Cleveland metropolitan scene.

B. REAL ESTATE TAX PREFERMENT OF OPEN LAND

1. Introduction

Real estate taxes have been perceived to be a key factor in the land-use equation. Land is assessed at value, and taxes begin to creep upward as farmland acquires added value, reflecting its potential for residential development. This increase in costs may accelerate the decision to convert land from agricultural use to some more lucrative one. Efforts have been made to continue to assess farm land at its agricultural value without regard to its increasing potential for something else in order to keep rural land on the urban fringe open and undeveloped.

In order thus to encourage the continued farming of land on the outskirts of suburbia, the Maryland legislature enacted a Farm Assessment Act which granted these farms a partial exemption. Three landowners who were not given an exemption, because they were not actively farming their lands, raised the question of the constitutionality of this device, citing the Maryland Declaration of Rights proviso that "all taxes...shall be uniform as to land within the taxing district, and uniform within the class." Plaintiffs won[9]. The conservationists then had to move into the political arena and sponsor a constitutional amendment to legitimize the device[10].

Postulating a constitutional scene in which it is possible to treat with agricultural land separately, a simple tax abatement for farms actually subsidizes developers to make advance acquisitions of land. They need simply keep the land in agricultural use until the time is ripe to develop it and all the time they pay less taxes than had they banked in advance nonfarm land. Obviously then, any tax advantage has to be keyed into some additional system of controls if the advantage is actually going to achieve the purpose of maintaining prime land in agricultural use.

2. Covenants

Reacting to the Maryland experience, William H. Whyte suggested that three additional factors had to be worked into any tax preferment mechanism:

> "First, the open space assessment would apply not only to farmland, but to any land the openness of which would benefit the public....Second, open-space assessment was to be geared to the land-use plan of the local government....The third provision was for a partial recapture of taxes when open space was converted to another use."[11]

This is precisely what Pennsylvania had set out to do in 1966[12].

The Pennsylvania system applied to farmland, at first to fifty-acre units but later to twenty-acre ones, and to forest land, water supply land, and open space land generally[13]. These lands were eligible, moreover, only if they were appropriately designated on a municipal land-use plan[14]. This being the case, the owner could enter into a covenant with the county government, a covenant being a species of contract that binds subsequent owners of the real estate as well as the immediate promisor. This covenant runs for ten years and is automatically extended year by year unless appropriate notice to terminate it is given by one of the parties. Each year, in effect, the landowner and the county entered into a new ten-year contract. On its part, the county promises to assess the subject land at its market value for the use to which it is restricted by the covenant. In turn, the land owner commits himself not to alter the style of his use during the running of the covenant. In the event the landowner does alter the use, he is liable to the county for the difference in taxes between the amount actually paid and what would have been due without the restrictive covenant. While these damages are calculated from the time the agreement commenced, in no event is the landowner liable for more than five years of back taxes[15].

California, as has been seen, made provision for exclusively agricultural zoning. Zoning, however, while it does channel development, does not stop it. California assessors, therefore, continued to assess farmland in terms of its development potential on the assumption that zoning controls were, in a real world, a paper tiger[16]. This led to the Land Conservation Act of 1965, or the Williamson Act[17]. This system provided for a ten-year contract along the same lines as the covenant system adopted in Pennsylvania when prime agricultural land was involved. By way of a further inducement, the county could pay the farmer an annual five cents for each dollar of assessed land put under contract. Provision was made for cancelling the contract before its term had expired, but this required state-level approval. At the same time, however, a landowner and county could enter into an "agreement" for a shorter period when the land, including prime agricultural land, fell within a zone designated by the county plan to be an "agricultural preserve."

Given the more flexible agreement route, relatively little prime agricultural land was subjected to the long-term contract constraints. The owners of farmland opted for short-term agreements in order to preserve their freedom of choice, and the county governments were not anxious to lose the tax revenues involved in the contract approach[18]. The California voters, however, approved an amendment to the state constitution mandating that assessors should assess "such open space lands on the basis only of such restriction...and...shall consider no [other] factors."[19] A number of modifications were then made in the system, but the printed reports about the mechanism have not been favorable.

> "The Act does not preserve open spaces near urban centers... It does not provide relief for the farmer in the path of inefficient sprawl, since it does not give him a realistic incentive in the face of high capital gains from land sale."[20]

At best, perhaps, the mechanism has preserved open land beyond the immediate pressure of urbanization - no mean feat in itself - while it has neither protected much prime agricultural land on the urban fringe nor proved to be a solution to urban sprawl[21].

C. EASEMENTS

It has been suggested that tax-reduction devices "should be regarded as half-way measures, justified only when political processes will not accept permanent restrictions."[22] In castigating overly large lot zoning in suburbia for its exclusionary effect, Pennsylvania's highest court has suggested that:

> "If the preservation of open spaces is the...objective, there are means by which this can be accomplished which include authorization for...condemnation of development rights with compensation paid for that which is taken."[23]

All of which renders relevant the scenic easement device.

The Wisconsin decision in Kamrowski v. State[24] illuminates this scene in a thrice. In order to protect the natural scenery along certain highways, the state condemned a "scenic easement" over private lands abutting them. In effect, this easement imposed a status quo on the use of land as it then was, effectively taking away the owners' rights to develop differently in futuro. Given compensation, these controls were immune to the argument that as regulations they amounted to confiscation. The only question was whether there was involved a public purpose that would justify the use of the taking power. It was held to be a public purpose.

Given the contemporary perception that food is in short supply and perforce farmland a national resource, the state could condemn a similar easement over farmland. Irrevocably removed from the local scene would be the choice to put this land to a different use, in which case tax assessments should have to be imposed exlusively in terms of the subject lands' value as agricultural land. In short, there are no constitutional objections to this praxis. The choice is a political one[25].

D. STATE LEVEL CONTROLS

Zoning tends to be a diffuse system of controls Balkanized into hundreds of locally based systems. Tax preferment schemes affect the local tax base immediately at a time when local governments are hard pressed to make up any reduction in real estate revenue by increasing taxes on nonfarm land. Any large-scale development right acquisition program may exceed the financial capacity of local governments. Thus, parallel with these approaches to land-use control, there has developed a trend toward exercising more authority at state level.

Concern over the loss of land used for growing pineapple and sugar cane crops caused Hawaii[26] to resort to a system in which a state-level commission places all land into urban, rural, agricultural, or conservation districts. Urban districts roughly approximate already developed areas, whereas rural districts are equivalent to mainland suburban ones. Urban

districts are subject to municipal zoning controls, but rural and agricultural districts are subject to control directly by the state commission. In urban areas land is taxed at a higher rate than buildings in order to encourage its development. At the same time the system provides for a lower rate of real estate taxation in agricultural districts. In large measure, however, the Hawaii system was designed to control the transition of the state's economy from one based on agriculture to one based on tourism. So parochial are the problems of Hawaii that it may not be a helpful model for mainland use.

Vermont also found itself invaded by recreational and second-home developers. Close beneath that state's greenery is bed-rock promising disaster when developers clustered houses on tiny lots served only by septic tanks. Scattered development all over the landscape, moreover, promised future capital budgeting nightmares if later more civilized forms of sewage disposal had to be provided. On paper Vermont already had enacted modern enabling legislation which required that, before a community enacted zoning and subdivision controls, it had first to do comprehensive planning[27]. Like most enabling legislation, this was permissive only and many municipalities simply had not acted. Action once the threat was perceived would take time. The strategy then centered upon a state-level approach to land-use control, particularly at a time when concern over Vermont's environment made a state-wide approach politically feasible.

A state-level environmental board was charged with the duty to create a development plan to project how best the state should evolve. Once goals are perceived, the board is to adopt a land use plan broadly demarcating the proper use of land in the state, whether for forestry, recreation, agriculture, or urban purposes. The municipalities in turn are expected to gear up their planning within the context of this overall state plan. Meanwhile, however, certain large-scale developers have been subjected to the need to obtain state permits to proceed.

Henceforth the developer of a housing project containing ten or more units would have to obtain a permit from a district commission. So would the developer for commercial or industrial purposes who was dealing with (1) more than one acre of land in a community that had not implemented its planning authority, or with (2) more than ten acres of land anywhere. Eligibility for a permit was premised upon a number of complex criteria. A subdivider remote from public services, for example, would have to demonstrate that the potential public costs of his proposal would not outweigh its tax and other public benefits. The developer working in a rural area would have to demonstrate compatability of his proposal with the state's development plan, projected local public services, and the potential of the area's road system[28].

If and when local communities implement their control potential, these developers will have to obtain clearance at both state and local levels. Critics point out that this will add to the cost of housing. They further point out that the district commissions can impose conditions upon subdividers. Underground wiring, generous open space, and hypertechnical grading requirements do preserve the environment, but they also increase substantially the unit costs of housing[29]. A member of the Vermont legislature which enacted the original form of this regulatory scheme in 1970 has protested that it has led in practice to the centralization of the

control of land use at the state level, and that it presages a return to the feudal notion that land is merely "held" for the benefit of society[30].

E. NEW THRUSTS

Along with the conventional mechanism thus far rehearsed, entirely new techniques are coming into prominence. In lieu of property taxes, for example, taxes imposed upon the profits obtained from land sales may have an even more direct impact upon the pattern of land-use decision-making. Thus Vermont has begun to impose a tax upon capital gains derived from real estate transactions, designed to "bite" precisely upon rapid transfers of land. Positing that speculation in land entails quick turnovers, this system is designed to encourage precisely the opposite behavior[31].

At the same time, "development rights" may yet evolve as a market in their own right designed to circumvent the "taking" conundrum. Posit, for example, the owner of two adjoining lots, one empty and the adjoining one occupied by an historic landmark. A police-power designation prohibits the destruction of the landmark building, but this "regulation" may be void as a "taking" if a reasonable return cannot be had from the building. In an urban center real estate taxes are likely assessed upon this historic site in terms of its "best" use, exacerbating the scene because these taxes, fixed in high-rise terms, tend to prove the unreasonableness of any return on the designated building locus. Let the owner of the historic site "transfer" his zoning law potential to build over and above the landmark to his adjoining lot, however, and a new calculus obtains. His real estate taxes on his "landmark" decrease because any potential to build bigger no longer exists, while he has exploited this very potential over his empty lot by building extra dimensions. He has lost nothing, so nothing can have been taken[32]. Transpose this notion into an exchange between rural land and urban land, and a similar strategy may yet circumvent the taking charge[33].

F. PROJECTIONS DANGEROUS

Sufficient unto the day, local zoning likely will be replaced by more sophisticated land-use controls, leading to a multi-faceted mechanism blending police-power regulations, condemnation, and the taxing power. Overall definitions of "policy"--decisions over preserving farmland and at what costs--will likely migrate to state level. Administration of controls will likely shift to at least a regional focus. Beyond this, prediction is futile, because in this Republic the precise dimensions of this new system will be tailored to meet the felt needs of each individual state.

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1. Morse v. County of San Luis Obispo, 247 Cal. App. 2d 600, 55 Cal. Rptr. 710 (1967).

2. Gisler v. County of Madera, 38 Cal. App.3d 303, 38 Cal. Rptr. 919 (1974).

3. Compare Gisler, n.2 supra, sustaining 18-acre minimum lot zoning on the floor of the San Joaquin Valley, with National Land & Investment Co. v. Easttown Township, 419 Pa. 504, 215 A.2d 597 (1965), striking down 4-acre minimum lot zoning in a residential suburb of Philadelphia.

4. WHYTE, THE LAST LANDSCAPE 48 (1968).

5. Note, Preservation of Open Spaces Through Scenic Easements and Greenbelt Zoning, 12 STAN. L. REV. 638, 640-42 (1960).

6. CAL. GOV. CODE §35009 (Supp. 1974).

7. WHYTE, op.cit. n.4 supra, 49-50.

8. See PART I, supra.

9. State Tax Commission v. Wakefield, 222 Md. 543, 161 A.2d 676 (1960).

10. See WHYTE, op.cit. n.4 supra, 105-106.

11. Id. at 111. Interestingly enough, Whyte was not able to obtain his last two refinements in Connecticut where he was most active designing a system. Id. at 112-113; CONN. GEN. STAT. ANN., tit. 12, §§12-107a et seq. (Supp. 1974). Maryland itself subsequently adopted a limited roll-back provision.

12. Session Laws of Pennsylvania, Public Law 1292, Jan., 13, 1966.

13. PUR. PA. STAT. ANN., tit. 16, §11941 (Supp. 1974).

14. Id. at §11942.

15. Id. at §11946.

16. NADER STUDY GROUP REPORT ON LAND USE IN CALIFORNIA, POLITICS IN LAND 35-36 (1973); Note, Property Taxation of Agricultural and Open Space Land, 8 HARV. J. LEGIS. 158 (1970).

17. CAL. GOV. CODE §51200 et seq. as amended (Supp. 1974).

18. NADER STUDY GROUP, op.cit. at n.16 supra, 38.

19. CAL. CONST. art. XXVIII.

20. NADER STUDY GROUP, op.cit. at n.16 supra 41; ROCKEFELLER TASK FORCE, THE USE OF LAND 129-130 (1973):

> "The Williamson Act and its administration have been much criticized....The situation is worse in New Jersey...In one New Jersey county a major beneficiary of property tax benefits is a public utility that is seeking an industrial buyer for the acreage it now maintains in agriculture."

21. Note, Property Taxation of Agricultural and Open Space Land, 8 HARV. J. LEGIS. 158, 189-192 (1970).

22. ROCKEFELLER TASK FORCE, THE USE OF LAND 130 (1973).

23. National Land & Investment Co. v. Easttown Township, 419 Pa. 504, 529, 215 A.2d 597, 611 (1965).

24. 31 Wis.2d 265, 142 N.W.2d 793 (1966).

25. See particularly Rosso v. Puerto Rico, P.R.R. (1967), appeal dismissed per curiam, 393 U.S. 14 (1968). This is hardly a new idea, witness NATIONAL RESOURCES PLANNING BD., PUBLIC LAND ACQUISITION IN A NATIONAL LAND-USE PROGRAM pt. II (1940).

26. See generally BOSSELMAN & CALLIES, THE QUIET REVOLUTION IN LAND USE CONTROL 5 et seq. (C.E.Q. 1971).

27. VT. STAT. ANN., tit. 24, §4401 (Supp. 1974).

28. See VT. STAT. ANN., tit. 10, ch. 151 (Supp. 1974).

29. BABCOCK & BOSSELMAN, EXCLUSIONARY ZONING 165-68 (1973).

30. Letters to the Editor, Wall Street Journal, July 22, 1974, p. 9, col. 6.

31. VT. STAT. ANN., tot. 32, §236-10001 et. seq. (Supp. 1974).

32. See generally COSTONIS, SPACE ADRIFT (1974).

33. See particularly, infra, remarks of B. CHAVOOSHIAN, Cook College, Rutgers University.

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